FILED
SEP 1 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1950—No. 285

Estate of MAX STRAUSS, also known as MARX STRAUSS, deceased, MARJORIE F. TREGANOWAN, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TIMOTHY N. PFEIFFER,
Counsel for Petitioner.

MILBANK, TWEED, HOPE & HADLEY,
Attorneys for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Summary Statement of the Matter Involved	2
Specification of Errors to be Urged	5
Reasons for Granting the Writ	5
Conclusion	9
Appendix: Statutes and Regulations	11

CITATIONS

Cases:

Chase National Bank *v.* United States, 278 U. S. 327 (1929)	5, 6
Chew's Estate *v.* Commissioner, 148 F. 2d 76 (5th Cir. 1945), *cert. denied,* 325 U. S. 882 (1945)	7–8
Goldstone *v.* United States, 325 U. S. 687 (1945)	7
Helvering *v.* Le Gierse, 312 U. S. 531 (1941)	7
Keller *v.* Commissioner, 312 U. S. 543 (1941)	7
New York Life Insurance Company *v.* Statham, 93 U. S. 24 (1876)	7
Ritter *v.* Mutual Life Insurance Company, 169 U. S. 139 (1898)	7
Seward's Estate *v.* Commissioner, 164 F. 2d 434 (4th Cir. 1947)	7

PAGE

Statutes and Treasury Regulations:

Title 28, U. S. C. § 1254 (1) ---------- 1
Internal Revenue Code, Title 26, U. S. C. § 1141 (a) --- 1
Internal Revenue Code, Title 26, U. S. C. § 811 (g) 2, 5, 7, 11
Revenue Act of 1926, § 302 (g) ---------- 7
Revenue Act of 1942, § 404 (a), (c) ----------2, 5, 6, 12
Treasury Regulations 105, §§ 81.25, 81.27 ---------2, 12–14

Supreme Court of the United States

Estate of Max Strauss, also known as Marx Strauss, deceased, Marjorie F. Treganowan, Executrix, *Petitioner,* v. Commissioner of Internal Revenue, *Respondent.*	October Term, 1950 No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Estate of Max Strauss, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case June 6, 1950 (R. 64*).

Opinions Below

The opinion of the Tax Court (R. 22-35) is reported in 13 T. C. 159. The opinion of the Court of Appeals for the Second Circuit (R. 54-62) is reported in F. 2d .

Jurisdiction

The jurisdiction of this Court is invoked under Tit. 28 U. S. C. § 1254(1) (62 Stat. 928) and under I. R. C. Tit. 26 U. S. C. § 1141(a) (53 Stat. 164 as amended by 62 Stat. 991 and 63 Stat. 107). The judgment of the Court of Appeals was entered June 6, 1950.

---

* References are to the printed record.

Questions Presented

1. Is an amount received by the widow of the deceased from the Gratuity Fund of the New York Stock Exchange includible in the decedent's gross estate as life insurance under § 811(g) of the Internal Revenue Code?

2. If so, is there an "incident of ownership" in a policy of insurance, within § 404(c) of the Revenue Act of 1942, to be found in the mere fact that the disposal of a membership in the New York Stock Exchange incidentally carries with it the right of the next-of-kin of a member to receive on his death amounts collected from other members by the Gratuity Fund.

Statutes Involved

In the appendix below at pages 11-14 will be found the pertinent provisions of the statutes (§ 811(g)(2) of the Internal Revenue Code as amended by § 404(a) of the Revenue Act of 1942; § 404(c) of the Revenue Act of 1942) and pertinent parts of Treasury Regulations (Reg. 105, §§ 81.25, 81.27).

Summary Statement of the Matter Involved

A deficiency of $5,883.93 in petitioner's estate tax was found by the Commissioner (R. 22), on the basis of a determination that $20,000 paid out of the Gratuity Fund of the New York Stock Exchange to the widow was includible in decedent's gross estate within § 811(g) of the Internal Revenue Code (R. 27). The estate petitioned the Tax Court for a redetermination, contending (1) that the $20,000 did not constitute proceeds of life insurance and was not received "as insurance under policies upon the life of the decedent"; (2) that even if the amount did constitute insurance, still under § 404(c) none—or at most only a small proportion—of the alleged deficiency existed because (a) the decedent had no incident of ownership after January 10, 1941 and (b) he paid no premiums—or at most only a small proportion of the total—after that date. (*Cf.* R. 32, 22-3).

Facts were found by the Tax Court on the basis of a stipulation of facts (R. 23, 36-46); and the constitution of the New York Stock Exchange (an exhibit) was incorporated by reference in the Tax Court's decision (R. 23). The Gratuity Fund plan of the Exchange in its essential features has been in operation since 1873 (R. 23, 38, 40), long before there was any estate tax at all, and of course long before there was any provision as to includibility of insurance. The chief characteristics of the plan as at the death of the decedent in 1944 can be outlined as follows:

Participation in the plan was an incident of membership in the Exchange. Every member was to make a payment to trustees of the Fund ($15.00) upon being admitted to membership (R. 23-4, 38) and pledge himself to make a gift ($15.00) to the family of a deceased member on a member's death (R. 24, 38) on penalty of suspension (R. 25, 41). In the case of anyone still a member at his death, the Exchange was to pay over to his family so much of $20,000 as was collected from the other 1,374 members; it was expressly provided by the Stock Exchange constitution that there was no liability of the Exchange to pay anything except as thus collected (R. 24, 25, 49). It will thus be seen that there was no possibility of choice on the part of a member whether or not to participate in the plan; nor was the Exchange free to reject any member as a participant in the plan whatever his age or state of health, or to vary according to such factors the amounts to be paid.

No member had any right to designate who should receive the $20,000, or any power or right to divert the benefits; the relative who was to receive the amount was named by the constitution of the Exchange (R. 24-25, 40), which could be changed only if (1) the change was first approved by the board of governors, and (2) 688 members out of 1,375 voted on the amendment and a majority thereof approved (R. 43, 38).

The Gratuity Fund had been built up out of profits of the Exchange as well as out of interest on investments, the payments of the initial fee, and the slight excess of collec-

tions from surviving members over the amount paid to the kin of deceased members (R. 26, 38-39). Later, allocation of profits of the Exchange and then accumulation of income were stopped; and credits were made out of the Fund against members' obligations on account of other members' deaths (R. 26, 39). The payments and credits of decedent were as follows:

	Amounts payable on account of death of other members	Credits of decedent out of Fund against such amounts	Amounts paid by decedent on account of death of other members
1. Between January 15, 1925 (when decedent became a member—R. 23) and January 10, 1941 (statutory cut-off)	$3,185.00	$1,024.52	$2,160.48
2. Between January 10, 1941 and September 11, 1944 (date of death) ..	795.00	795.00	—
3. Between September 11, 1944 and July 19, 1945 (when membership was transferred, see R. 26) by his estate	255.00	255.00	—

(See R. 27, 45).

The Tax Court (two members dissenting) held that no part of the $20,000 was includible as insurance, and hence the Tax Court did not reach the question of whether there were incidents of ownership or payment of premiums (R. 32). The United States Court of Appeals for the Second Circuit reversed, holding the whole amount includible, with a partial dissent by Judge Learned Hand (R. 62-64) on the ground that the decedent possessed no incidents of ownership in the "insurance" after January 10, 1941, and hence only about one-quarter of the total should have been included. Judge Hand apparently regarded the credits both before and after the decedent's own death as premiums paid by the decedent (R. 63-64).

Specification of Errors to be Urged

The Court of Appeals for the Second Circuit erred

(1) In its holding that the $20,000 paid as a result of the New York Stock Exchange Gratuity Fund plan was receivable under a policy of insurance upon the life of the decedent.

(2) In holding that if this was insurance, the decedent possessed any incidents of ownership therein after January 10, 1941; and also that he paid premiums thereon after the date, and that the amount of such premiums was $1,050.

(3) In reversing the decision of the Tax Court.

Reasons for Granting the Writ

1. The phrase "incidents of ownership", occurring in both Section 811(g) of the Internal Revenue Code and Section 404(c) of the Revenue Act of 1942, is important in the administration of the tax statutes. Its meaning has never been passed on by this Court, although before the language was used in the statute the Court in *Chase National Bank* v. *United States*, 278 U. S. 327, 335 (1929) did list examples of incidents of ownership. The court below, in applying the statute to the situation before it, has given the phrase "incidents of ownership" a basic and sweeping interpretation, going beyond the suggestions of the *Chase National Bank* case; and has thus decided an important question of federal law which should be settled by this Court.

Section 811(g) of the Internal Revenue Code provides for includibility in the decedent's gross estate of insurance on his life, even though the proceeds are not payable to his estate, if, but only if, either (a) he paid premiums or (b) he had incidents of ownership. If "incidents of ownership" is construed so broadly that such an incident can be found to be possessed by the decedent whenever his life was insured, then it would have been pointless for Congress to insist that one of the alternate requirements be present as

well. Likewise there would become quite meaningless the provision in Section 404(c) of the Revenue Act of 1942, giving partial exemption for those who possess no incident of ownership after January 1941. The decision below approaches, if it does not reach, a breadth that would accomplish that result.

Although a member of the Stock Exchange had on becoming a member no option but to participate in the plan, and had no right either to name or to change the relative who was to receive at his own death contributions from other members, and though he could not pledge or in any way realize upon the right in and of itself, the majority below found an incident of ownership merely from the fact that if a Stock Exchange member ceases to be a member (selling his seat on the Exchange) his next of kin will no longer have the right to receive those contributions from other members of the Exchange.

Judge Learned Hand's dissent strongly states the case for not regarding this situation as creating an incident of ownership in proceeds of the Gratuity Fund plan. His opinion was that a relatively unimportant incidental effect of the sale of something else was not the equivalent of a power to surrender and cancel an insurance policy (R. 63). Those rights of surrender and cancellation, when used with reference to insurance, clearly mean the right to give up the policy independently of anything else, and receive a surrender value (*cf. Chase National Bank* v. *United States, supra*).

The Court of Appeals was also wrong in treating as premiums paid by the decedent payments made out of a fund to the accumulation of which the decedent had contributed an infinitesimally small amount. Moreover, the Court of Appeals was clearly wrong in including in the total the amounts which were paid out of that fund after the decedent's own death.

We urge upon this Court the importance of correcting an obvious misinterpretation of a part of a tax statute necessarily affecting a large number of people.

2. The decision below also involved a basic interpretation of the word "insurance", used in Section 811(g) of the Internal Revenue Code. This word is likewise of great importance in the administration of the tax law. The interpretation given it by the Court below is, in petitioner's view, contrary to the principles enunciated by this Court in *Helvering* v. *Le Gierse*, 312 U. S. 531 (1941) and the companion case of *Keller* v. *Commissioner*, 312 U. S. 543 (1941). (Those cases interpreted the word "insurance" as used in Section 302(g) of the Revenue Act of 1926, as amended, which subsequently became Section 811(g) of the Internal Revenue Code.) In so far as the *Le Gierse* and *Keller* cases are not applicable to the precise point involved here, it is of importance that the Court should give an authoritative interpretation of what is insurance.

The decision of the Court below is also contrary to the spirit of the definition of life insurance in *Ritter* v. *Mutual Life Insurance Company*, 169 U. S. 139 (1898), where this Court said:

> "Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age the probable duration of life." (pp. 151-152)

See also *New York Life Insurance Company* v. *Statham*, 93 U. S. 24, 32 (1876) and *Goldstone* v. *United States*, 325 U. S. 687, 690 (1945); and such cases in the lower federal courts following the *Le Gierse* case, as *Seward's Estate* v. *Commissioner*, 164 F. 2d 434, 437 (4th Cir. 1947); and

Chew's Estate v. *Commissioner*, 148 F. 2d 76 (5th Cir. 1945), *cert. denied*, 325 U. S. 882 (1945).

The previous Supreme Court cases have insisted on the elements of risk shifting and risk distributing as necessary to insurance; and have emphasized the dependence of life insurance on the law of averages, and on calculations of life expectancy and the determination of a premium with reference thereto. These elements are lacking in the Stock Exchange plan which, as the statement above shows:

(a) does not have premiums based in amount on the risk involved or the life expectancy of any member;

(b) does not provide for sharing the risk on any equitable basis;

(c) does not distribute the risk sufficiently widely for the law of averages to apply (there are only 1,375 members of the Stock Exchange);

(d) does not in any proper sense involve risk sharing and risk distributing.

In short, the plan does not meet the present day common understanding of what constitutes insurance and does not conform to basic actuarial principles. There was, furthermore, nothing that could properly be called a "policy," although the statutory requirement calls for inclusion of amounts receivable "under policies upon the life of decedent."

Not only is a general construction of the term "insurance" important but the application of the word to these particular facts directly affects far more people than the one taxpayer who is petitioner here.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated, New York, N. Y.
September 1, 1950.

Respectfully submitted,

TIMOTHY N. PFEIFFER,
Counsel for Petitioner.

MILBANK, TWEED, HOPE & HADLEY,
Attorneys for Petitioner.

Appendix

Internal Revenue Code

Section 811(g)(2), as amended by Section 404(a) of Revenue Act of 1942:

"SEC. 811. GROSS ESTATE.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

"(g) *Proceeds of Life Insurance.*—

* * * * *

"(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest."

scription of this and other incidents of ownership, see the following paragraph and paragraph (b) of this section.

"For the purposes of this section, the term 'incidents of ownership' is not confined to ownership in the technical legal sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent. For the purposes of this subsection, the term 'incidents of ownership' includes the incidents of ownership described in paragraph (b) (except as provided in the next sentence) and, in addition, includes incidents of ownership possessed by the decedent as manager of the community where the insurance policy is property held as community property by the decedent and spouse. Section 811 (g) (2), as added by the Revenue Act of 1942, expressly provides that for the purposes of section 811 (g) (2) (B), (see (2) of this paragraph) but not for the purposes of section 811 (g) (2) (A), (see (1) of this paragraph), the term 'incidents of ownership' does not include a reversionary interest. However, an assignment of an insurance policy by a decedent possessing other incidents of ownership therein under which he reserves a reversionary interest may result in the proceeds of the policy being includible in his gross estate under section 811 (c). See section 81.25."

"(b) *In case of decedent dying on or before* October 21, 1942. * * *

* * * * *

"Incidents of ownership in the policy include, for example, the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possesses an incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example, if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Argument	7
Conclusion	9
Appendix	10

CITATIONS

Cases:

Helvering v. *Le Gierse*, 312 U. S. 531	7
Keller v. *Commissioner*, 312 U. S. 543	7

Statutes:

Internal Revenue Code, Sec. 811 (26 U.S.C. 1946 ed., Sec. 811)	7, 8, 10
Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 404	8, 10

Miscellaneous:

H. Rep. No. 2333, 77th Cong., 2d Sess., p. 163 (1942-2 Cum. Bull. 372)	8
S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 234-236 (1942-2 Cum. Bull. 504)	8
T. D. 5032 1941-1 Cum. Bull. 427, amending Treasury Regulation 80 (1937 ed.), Art. 27	8
Treasury Regulations 105, promulgated under the Internal Revenue Code:	
Sec. 81.25	11
Sec. 81.27	8, 11

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 285

ESTATE OF MAX STRAUSS, ALSO KNOWN AS MARX STRAUSS, DECEASED, MARJORIE F. TREGANOWAN, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 22-35) is reported in 13 T. C. 159. The opinion of the Court of Appeals (R. 54-64) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 6, 1950. (R. 64.) The petition for a writ of certiorari was filed September 1, 1950.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the amount of $20,000 paid to the widow of the decedent, a member of the New York Stock Exchange, at his death, out of the "Gratuity Fund" set up under the constitution of the Exchange, was received by her as insurance under a policy upon his life under Section 811(g)(2) of the Internal Revenue Code.

2. If so, whether the whole or only a part thereof is includible in the decedent's gross estate under that section and Section 404(c) of the Revenue Act of 1942.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, infra, pp. 10-13.

STATEMENT

The facts were stipulated (R. 36-46), and were found by the Tax Court as stipulated (R. 23-27). So far as material here, they may be summarized as follows:

The decedent was born in 1886 and died in 1944. In 1925 he was elected a member of the New York Stock Exchange and remained such until his death. (R. 23.)

By an amendment to its constitution the Exchange in 1873 adopted a plan providing for the

payment by its surviving members of a certain sum to the families of deceased members out of a fund then created and designated as the Gratuity Fund. (R. 23.) In this respect, the constitution contained the following further provisions:

Before anyone was admitted to membership in the Exchange, he was required to pay to the trustees of such fund the sum of $15. The trustees consisted of the chairman of the Board of Governors of the Exchange and six of its members. Each member was required to pledge himself to make a so-called voluntary gift to the family of each deceased member in the sum of $15, to be paid at quarterly periods on the dates on which dues to the Exchange were paid. The Exchange pledged its faith to pay, within one year after proof of the death of any member, out of the moneys so collected by it, the sum of $20,000, or so much thereof as may have been collected, to the widow and children of the deceased, or their issue, or his heirs under the laws of the State of New York, as the case might be; the liability of the Exchange being limited, however, to the payment of such sum, or to such part thereof as may be collected, after it shall have been collected from the members. Nothing contained in the constitution was to be construed as constituting any estate *in esse* which could be mortgaged or pledged by a member, and no member has at any time had the right to name, select, or designate any beneficiaries other than those named above or in any way to divest the benefits

Revenue Act of 1942

"§ 404. PROCEEDS OF LIFE INSURANCE

"(a) *General rule.* Section 811(g) (relating to life insurance) is amended to read as follows:

[See above]

* * * * *

"(c) *Decedents to which amendments applicable.* The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

Regulations 105:

"Sec. 81.25 (as amended by T. D. 5239, March 10, 1943) *Life Insurance.*—Section 811 (g) provides for the inclusion in the gross estate of insurance on the decedent's life (a) receivable by or for the benefit of the estate (for which see section 81.26), and (b) receivable by other beneficiaries (for which see section 81.27).

"The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system."

* * * * *

"Sec. 81.27 (as amended by T. D. 5239, March 10, 1943) *Insurance receivable by other beneficiaries.*—(*a*) *In case of decedent dying after October 21, 1942.*—The regulations prescribed under this paragraph (except as otherwise indicated herein or in paragraph (b) of this section) are applicable only in the case of decedents who died after October 21, 1942, the date of the enactment of the Revenue Act of 1942. In such cases, the amount of the aggregate proceeds of all insurance

on the life of the decedent not receivable by or for the benefit of his estate must also be included in his gross estate, as follows:

"(1) Such insurance (not includible under (2) of this paragraph) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, and

"(2) Such insurance with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any person.

"The purchase of insurance upon the life of the decedent is attributed to the decedent even though the premiums, or other consideration, are paid only indirectly by the decedent. As thus used, the phrase 'paid indirectly by the decedent' is intended to be broad in scope. For example, if the decedent transfers funds to his wife so that she may purchase insurance on his life, and she purchases such insurance, the payments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent. A decedent similarly pays the premiums or other consideration if payment is made by a corporation which is his alter ego or by a trust whose income is taxable to him, as, for example, a funded insurance trust. A payment is also made by the decedent if the decedent's employer makes the payment as compensation for services."

* * * * *

"For the purposes of (1) of this paragraph, in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy. For the purpose of the preceding sentence a reversionary interest is an incident of ownership. For a de-

from the persons specified in the constitution. (R. 23-25.)

Finally, the constitution provided that, if any contribution due to the Exchange, including the contribution to the Gratuity Fund, was not paid by any member within forty-five days after it became due, the delinquent member should be reported by the treasurer of the Exchange to the Chairman of the Board of Governors and that, after written notice mailed to him of such arrearages, such member might be suspended by the Board until payment was made. And, should payment not be made within one year after it was due, the membership of the delinquent might be disposed of by the Board on at least ten days' written notice mailed to him at his address registered with the Exchange. (R. 25.)

In the early period of the fund it was built up in four ways: (1) from an initial payment of $10 by each member of the Exchange and each person who was thereafter admitted to membership, (2) from allocation to the fund of half the annual profits of the Exchange in excess of $10,000, (3) from the excess of the amounts collected from surviving members over the amount paid to the kin of deceased members (which was originally $10,000), and (4) from the accumulation of interest on the invested capital of the fund. In 1896 the allocation to the fund of half of the annual profits in excess of $10,000 was terminated. In 1915 the accumulation of the income of the fund was termi-

nated and thereafter the net income was credited pro rata to the members of the Exchange in reduction of the amounts payable by them on the deaths of other members. (R. 26.)

On March 26, 1941, a constitutional amendment was adopted providing for the use of both capital and income of the fund as a credit against amounts otherwise payable by surviving members so long as the value of the fund should remain in excess of $500,000. During the period from January 15, 1925, to January 1, 1941, the trustees of the Gratuity Fund at the close of each fiscal or calendar year paid over to the treasurer of the Exchange the annual net income received as interest on the Gratuity Fund which in turn was credited pro rata to the members of the Exchange as of the first day of the succeeding fiscal or calendar year and applied in reduction of amounts payable by each member in respect of the deaths of other members. (R. 26.)

During the period from January 1, 1941, through July 19, 1945, the date on which the decedent's membership in the Exchange was transferred by the executrix, the trustees of the fund paid to the treasurer of the Exchange at the close of each quarterly period the aggregate of all amounts paid or payable by members of the Exchange under the provisions of the constitution in respect of deaths occurring during such quarter and the treasurer of the Exchange credited those amounts proportionately against the amounts so paid or payable

by each member in respect of the deaths of members occurring during that quarter. (R. 26-27.)

From January 15, 1925, through January 10, 1941, the gross amounts payable by decedent in respect of deaths of other members of the Exchange amounted to $3,185. During the same period the amounts credited to the decedent amounted to $1,024.52. (R. 27.)

From January 11, 1941, through September 11, 1944, when decedent died, the gross amounts payable by decedent in respect of deaths of other members of the Exchange amounted to $795. During the same period the amounts credited to decedent, as above stated, amounted to $795. From September 11, 1944, through July 19, 1945, the gross amounts payable by decedent's estate in respect of deaths of other members amounted to $255. During the same period the amounts credited to the decedent's estate in accordance with the above amounted to $255. (R. 27.)

Adele L. Strauss, the widow of decedent, received the sum of $10,000 by check dated October 16, 1944, issued by the "Trustees of the Gratuity Fund" of the Exchange, and also received the further sum of $10,000 by check dated July 9, 1945, issued by the "Trustees of the Gratuity Fund" of the Exchange. (R. 27.)

The Tax Court held that the $20,000 paid by the Exchange to the decedent's widow did not represent the proceeds of life insurance within the meaning of Section 811(g)(2) of the Internal Revenue

Code. Accordingly, it expunged the deficiency determined by the Commissioner against the decedent's estate as a result of his inclusion of the entire amount of the $20,000 therein. (R. 32.) The Court of Appeals reversed the Tax Court's decision and reinstated the deficiency. (R. 64.)

ARGUMENT

1. The Court of Appeals held that the $20,000 paid by the New York Stock Exchange to the widow of the decedent upon his death was the proceeds of a policy of life insurance upon his life within the meaning of Section 811(g)(2) of the Internal Revenue Code, Appendix, *infra*, p. 10 because, under the plan of the Exchange pursuant to which this amount became payable, the risk of loss from the decedent's premature death was shifted from him individually to the group of other members of the Exchange and was thus distributed among such group. We submit that in so holding the Court of Appeals correctly applied the principles laid down by this Court in *Helvering* v. *Le Gierse*, 312 U. S. 531, and *Keller* v. *Commissioner*, 312 U. S. 543, to the facts of this case. Since the case turns upon its own particular facts, and since there is no conflict with any other decision, we do not believe the question presented is of sufficient general importance to warrant review by this Court.

2. The Court of Appeals, with one dissent, further held that the decedent possessed at his

death such an incident of ownership in the policy as would bring it within the ambit of Section 811(g)(2)(B) of the Code (*infra*, p. 10), and that accordingly no part of the $20,000 should be excluded from decedent's gross estate under Section 404(c) of the Revenue Act of 1942 (Appendix, *infra*, pp. 10-11). We submit that this conclusion is likewise correct. The decedent retained the right and power to "surrender or cancel" the policy, since he retained the right and power to dispose of his membership in the Exchange and thereby not only to deprive the beneficiaries of their rights in the proceeds of the policy, but to confer such rights upon others. See Treasury Regulations 105, Sec. 81.27, as amended by T. D. 5239, 1943 Cum. Bull. 1081, 1082 (Appendix, *infra*, pp. 11-13). The definition of the term "incidents of ownership" as including the right of surrender or cancellation of a policy (first used in T. D. 5032, 1941-1 Cum. Bull. 427, 429, promulgated January 10, 1941, which amended Article 27 of Treasury Regulations 80 (1937 ed.)) has been expressly approved by Congress. H. Rep. No. 2333, 77th Cong., 2d Sess., p. 163 (1942-2 Cum. Bull. 372); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 234-236 (1942-2 Cum. Bull. 504).

The dissenting judge in the Court of Appeals did not question that in general the right to surrender and cancel a policy is an incident of ownership within Section 811(g)(2)(B). He rested his position, in effect, on the view that in the circum-

stances here presented that right was relatively so unimportant as not to come within the congressional purpose. In the absence of a conflict of decisions, we also do not believe the narrow question thus posed to be of sufficient importance to warrant review.

CONCLUSION

The decision of the court below rests on the particular facts of the case, is plainly correct, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
ROBERT N. ANDERSON,
CARLTON FOX,
Special Assistants to the Attorney General.

SEPTEMBER, 1950.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property. * * *

* * * * *

(g) [As amended by Sec. 404(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Proceeds of Life Insurance.*—

* * * * *

(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 404. PROCEEDS OF LIFE INSURANCE.

* * * * *

(c) *Decedents to which amendments applicable.*—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy.

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.25 [As amended by T. D. 5239, 1943 Cum. Bull. 1081, 1092]. *Life Insurance.*—Section 811(g) provides for the inclusion in the gross estate of insurance on the decedent's life (*a*) receivable by or for the benefit of the estate (for which see Section 81.26), and (*b*) receivable by other beneficiaries (for which see Section 81.27).

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system. * * *

* * * * *

SEC. 81.27 [As amended by T. D. 5239, *supra*] INSURANCE RECEIVABLE BY OTHER BENEFICIARIES.—(*a*) *In case of decedent dying after October 21, 1942.*—The regulations prescribed under this subsection (except as otherwise indicated herein or in subsection (*b*) of

this section) are applicable only in the case of decedents who died after October 21, 1942, the date of the enactment of the Revenue Act of 1942. In such cases, the amount of the aggregate proceeds of all insurance on the life of the decedent not receivable by or for the benefit of his estate must also be included in his gross estate, as follows:

(1) Such insurance (not includible under (2) of this subsection) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, and

(2) Such insurance with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any person.

* * * * *

For the purposes of this section, the term "incidents of ownership" is not confined to ownership in the technical legal sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent. For the purposes of this subsection, the term "incidents of ownership" includes the incidents of ownership described in subsection (*b*) (except as provided in the next sentence) and, in addition, includes incidents of ownership possessed by the decedent as manager of the community

where the insurance policy is properly held as community property by the decedent and spouse. Section 811(g)(2), as added by the Revenue Act of 1942, expressly provides that for the purposes of section 811(g)(2)(B) (see (2) of this subsection), but not for the purposes of section 811(g)(2)(A) (see (1) of this subsection), the term "incidents of ownership" does not include a reversionary interest. However, an assignment of an insurance policy by a decedent possessing other incidents of ownership therein under which he reserves a reversionary interest may result in the proceeds of the policy being includible in his gross estate under section 811(c). See section 81.25.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960 908447 162